

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 - - - - - X
4 UNITED STATES OF AMERICA, : 12-CR-661(JG)
5 Plaintiff , :
6 -against- : United States Courthouse
7 ALI AHMED and MOHAMED : Brooklyn, New York
8 YUSUF, : January 15, 2016
9 Defendants. : 2:00 p.m.
10 - - - - - X

11 TRANSCRIPT OF SENTENCING
12 BEFORE THE HONORABLE JOHN GLEESON
13 UNITED STATES DISTRICT JUDGE.

14 APPEARANCES:

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17 BY: SHREVE ARIAIL
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24 SARAH KUNSTLER, ESQ.

25 For Defendant Yusuf: DAVID STERN, ESQ.
JANE S. SMITH, ESQ.

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Proceedings recorded by mechanical stenography, transcript
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1 THE CLERK: United States versus Ahmed, et al.

2 MR. ARIAIL: Good afternoon, Your Honor. Shreve
3 Ariail, Seth DuCharme and Richard Tucker for the United
4 States.

5 THE COURT: Good afternoon.

6 MS. KELLMAN: Good afternoon. Susan Kellman and
7 Sarah Kunstler for Ali Ahmed who is in the courtroom.

8 THE COURT: Yes.

9 MR. STERN: Good afternoon. David Stern and Jane
10 Smith and we're assisted by Mayerlin Ulerio for Mohamed Yusuf.

11 THE COURT: Good afternoon.

12 THE PROBATION OFFICER: Jaime Turton from Probation.

13 THE COURT: Yes. Thank you for being here. Thank
14 you for your work on the case.

15 Everyone can have a seat.

16 Okay. There is a presentence report and a couple of
17 addenda. Let me say at the outset how impressed I am with the
18 written advocacy in connection with this sentencing. These
19 papers are fabulous, all around. Thank you so much for them.
20 They are very useful.

21 Have you been over, Ms. Kellman and Mr. Stern, have
22 the two of you seen the presentence report and the two addenda
23 to it?

24 MS. KELLMAN: Yes, Your Honor.

25 MR. STERN: Yes.

1 THE COURT: Okay. Gentlemen, Mr. Yusuf and
2 Mr. Ahmed, let me address you individually.

3 Have you both had an opportunity to review these
4 documents?

5 Mr. Ahmed?

6 DEFENDANT YUSUF: Yes.

7 THE COURT: Mr. Yusuf?

8 DEFENDANT YUSUF: Yes.

9 THE COURT: You said yes to both.

10 MR. ARIAIL: I think Mr. Ahmed didn't answer.

11 THE COURT: Mr. Ahmed, have you seen these documents
12 or had them translated for you?

13 DEFENDANT AHMED: Yes, I have.

14 THE COURT: Okay. And have you had enough time to
15 go over them with your lawyers, Mr. Ahmed?

16 DEFENDANT AHMED: Yes.

17 DEFENDANT YUSUF: Yes.

18 THE COURT: Okay. There's a lot of back and forth
19 with objections to the presentence report. Let me share with
20 you my sense that this is a really difficult case. There are
21 some very difficult issues to address and I think that these
22 issues lie at the heart of the sentence determination.

23 One is the extent to which we have a situation where
24 one person's terrorism is another person's freedom fighting.
25 Another issue is the significance of the conditions of

1 confinement when they were first taken into custody in Africa.
2 Yet another is the conditions of confinement the last three
3 years here and going forward and those are all important
4 issues. I want to hear oral advocacy on those as well. And
5 then, and this is just an outcropping. I'm not being
6 critical. It is a result --

7 Let's swear the interpreter.

8 THE CLERK: Magna, can you rise and raise your right
9 hand, please.

10 (Interpreter sworn.)

11 THE CLERK: Please state your name for the record.

12 THE INTERPRETER: Magna Czagany.

13 THE CLERK: Thank you.

14 THE COURT: One result of this careful, thorough
15 advocacy is a lot of back and forth on issues that I don't
16 really regard as necessary. They don't really affect the
17 sentencing or I wouldn't consider them in any event. You
18 know, it got down to the difference between statements of
19 something happened in late 2008 as opposed to December of
20 2008. Good for you for fleshing that all out and bringing
21 those to the surface, but I don't want to get down in those
22 weeds.

23 It struck me in broad strokes that the objection
24 to -- it didn't just strike me, I'm ruling on this now so you
25 know -- but the objection to paragraphs 2 through 9, for

1 example, I am going to overrule that. I think that
2 information is properly in the presentence report.

3 The information about Hashi, these are different
4 numbered paragraphs depending on which two presentencing
5 reports you are looking at, but the paragraph on the
6 activities of Hashi and others, Sakr, I'm sure I'm
7 mispronouncing them, Berjawi, I understand there is an
8 objection to the inclusion of this information, but I am
9 overruling the objection.

10 To the extent that that information might prejudice
11 the defendants, I understand that the inclusion of a
12 statement, for example, a statement that there's no evidence
13 that any of these defendants was involved in beheadings, I
14 think, recognizing you have your objection, I think those
15 statements -- there is another -- sorry, but I don't have the
16 notes that I made upstairs before me. The government
17 mentions, for example, on page nine of its submission, a
18 modification with regard to the inclusion of a narrative about
19 foreign fighters. I think these ameliorative measures do the
20 trick. I don't regard that information as bearing on the
21 sentence. I think the heart of the sentence are the three
22 issues that I've described for you.

23 So that's a long-winded preface to asking defense
24 counsel, and thank you for your reply submission, what, in
25 light of the agreements that you have with regard to the

1 presentence report, do you really think I need to resolve here
2 before I have argument about the appropriate sentence?

3 Do you understand the question?

4 MS. KELLMAN: Your Honor, I think at least with
5 respect to Mr. Ahmed, I would say that the answer is if what
6 Your Honor is focusing on, and I think correctly, are the
7 first three issues that you highlight, then I'm happy to
8 restrict my comments to that and I, I have to say I think that
9 as advocates, we felt the need to respond to everything.

10 THE COURT: I understand.

11 MS. KELLMAN: But I think the Court appropriately
12 highlights the concerns that affect the sentence in this case
13 and I'm happy to abide by that.

14 THE COURT: And just to flesh it out a little bit,
15 with respect to the heart of the case, I don't think either
16 side is right necessarily that, you know, it's not irrelevant
17 that the freedom fighting was done through the vehicle of
18 al-Shabaab. Some inferences can be drawn that are adverse to
19 the defendants. At the same time, simply joining al-Shabaab
20 doesn't necessarily carry with it all that inferential impact
21 that the government wants it to carry. I mean, we will argue
22 about that. But these more particularized objections to the
23 presentence report I don't really find necessary for
24 resolution.

25 Put another way, under Rule 32, they don't affect

1 the sentence in my judgment so I don't intend to address them.

2 Mr. Stern, Ms. Smith, do you want to be heard?

3 MR. STERN: Can we just have one second?

4 (Pause.)

5 MR. STERN: I think that's fine with us, Judge.

6 What we would like then is that fact that you just said, they
7 don't affect your sentence, be put in the presentence report.
8 Of course these reports follow them wherever they go so to
9 some extent, I agree with you. Some of these things became
10 quibbles after a while, but we would like it then to be
11 reflected, wherever they go, the sentence was based on the
12 things we discussed in court here today and was not influenced
13 by the things you're suggesting don't influence you.

14 THE COURT: All right. Mr. Ariail?

15 MR. ARIAIL: Your Honor, in terms of the objections,
16 I think we tried, we tried our best to come to agreement where
17 we could. I think though there are two particular areas I
18 just want to make sure that I understand Your Honor correctly
19 as saying you are considering which are the, without reference
20 to the paragraphs, the November 2008 intercepts or wiretaps
21 that were conducted in Sweden and also the later intercepts in
22 2009 and 2010. I just want to make sure that those are, those
23 remain. I don't think those specific paragraphs were
24 referenced and I assume Your Honor is considering those.

25 THE COURT: I think those are properly before me for

1 what they're worth. There is no objection to that, I take it.

2 MS. KELLMAN: No, Your Honor.

3 Your Honor, one question, though. In the
4 government's submission early on in this submission, they
5 speak to certain of our objections and they say that they
6 agree with the defense as to this, that, and the other thing,
7 for example, that they weren't involved in beheadings and
8 suicide bombings.

9 THE COURT: Yes.

10 MS. KELLMAN: It would seem that, to further
11 Mr. Stern's comments to the Court, that perhaps those comments
12 would also be incorporated into the presentence report again
13 because they'll follow the defendants.

14 THE COURT: Absolutely. And what I think is useful
15 is for -- I looked at these addenda, but, for example, the
16 clarifying statement regarding beheadings. Everybody agrees
17 that should go in the presentence report.

18 Jamie, could you make those modifications?

19 THE PROBATION OFFICER: Yes, Your Honor.

20 THE COURT: And put your heads together with
21 Mr. Ariail, Mr. DuCharme, and Mr. Tucker and Mr. Turton and
22 let's make those revisions that are agreed upon. I'm all for
23 that. And then I think you ought to append a copy of the
24 transcript of this sentencing proceeding to the judgment.

25 Does anybody object to that?

1 MR. STERN: No.

2 MS. KELLMAN: No, Your Honor.

3 MR. ARIAIL: No, Your Honor.

4 THE COURT: All right. Anything else with regard to
5 the presentence report that anybody needs addressed before we
6 talk about what the appropriate sentence will be?

7 From the government?

8 MR. ARIAIL: No, Your Honor.

9 MS. KELLMAN: No, Your Honor.

10 MR. STERN: No.

11 THE COURT: Okay. Who wants to go first?

12 MS. KELLMAN: Your Honor, I think Mr. Stern has
13 asked to go first and I'm happy to yield.

14 THE COURT: Sure.

15 MR. STERN: A lot has been said in all of the
16 writings we've just been discussing about what Mohamed Yusuf
17 did in Somalia and for the most part, we agree.

18 He went to Somalia and fought as a soldier with
19 al-Shabaab. A lot has been said about who al-Shabaab is, and
20 while we don't agree with a lot of it or all of it anyway,
21 it's true that there are people in al-Shabaab who did some
22 things but he didn't do those things. I'm referring to
23 beheadings and bombings of civilian targets and bombings
24 outside the country.

25 What 3553(a) at least, in part, states is a

1 discussion of who the person is himself, not what organization
2 he belonged to, although I'm not saying that's irrelevant, and
3 not where he was but who he is and I'm going to confine my
4 comments mostly to just that.

5 I think we can all agree who he is not. He is not a
6 powerful figure in al-Shabaab. The government said he led a
7 platoon and translated for some kind of a cleric, but he was
8 really a soldier on the front lines fighting. We know he was
9 wounded. We know he carried a weapon. He has pled guilty and
10 doesn't deny any of those things.

11 One way we know he's not terribly important is how
12 little this case has been covered. We've all seen big cases,
13 big terrorism cases that are in the press every day, but no
14 one except for his family really cares what happens to him.
15 Al-Shabaab doesn't seem to care, the public doesn't seem to
16 care, the press doesn't seem to care, and that's some measure
17 of what a relatively unimportant role he played, not he
18 himself was unimportant, but the role he played in all of
19 this.

20 We know al-Shabaab doesn't care because I have done
21 cases where organizations make demands for people's release,
22 Sheik Abdel Rahman, the Islamic group was always making
23 demands for his release and kidnapping people to get him back.
24 No one from al-Shabaab has mentioned Mr. Yusuf. Once he was
25 taken, he was gone. They didn't send money to him. They

1 didn't hire a lawyer for him. He was just another soldier. I
2 think it's fair to say about all of these men, but I'm really
3 talking about Mr. Yusuf, that he's just cannon fire and I
4 don't mean that in a bad way about him or them. That's what
5 soldiers are in some way. But there's been no stir as a
6 result of his arrest and his prosecution in that organization.

7 It's worth noting about him that he is a profoundly
8 devout person and it's unfair to characterize his devoutness
9 as twisted. Whatever you think of al-Shabaab, whatever the
10 government thinks of al-Shabaab, Mohamed Yusuf is a person
11 with real deep and thoughtful religiosity and he came to it in
12 a way that many people come to, not just in Islam but all
13 faiths, to his own religiosity.

14 He was born in Somalia, brought to Sweden and
15 instead of moving to Stockholm where there's a large Somalian
16 community, he went to a small town and felt terribly isolated.
17 There were people there who could drink and because of his
18 faith, he couldn't drink. There were people there who could
19 date and because of his faith, he couldn't date. He was one
20 of the few non-white children he was in school with. While he
21 didn't have problems with them in the sense that they fought
22 or taunted him or things like that, he was completely isolated
23 and alienated because he had no one with whom he could bond.
24 It's easy to say, well, you could just change, you could give
25 up your faith, but we don't ask people do that and Sweden

1 doesn't ask people to do that.

2 At some point, he moved to Stockholm and all of the
3 sudden, he found a community of people with whom he had never
4 met before, a group of Somalis, many of whom were religious
5 like he was, many of whom were interested in his homeland like
6 he was, many of whom were black like he is, and he began to
7 absorb the things that community had to offer and one of the
8 things they had to offer was an outrage about what was going
9 on in Somalia and a respect for people who went to Somalia to
10 try to do something about it.

11 During this case, I went to Sweden while I was
12 trying to find witnesses for an issue that has nothing to do
13 with this sentencing and I went to a community meeting, the
14 Somali community. When you go to this Somali community in
15 Sweden, you're in a different world. I was staying downtown
16 in some hotel and I went to a community where everyone was
17 black and everyone was Somali and at this meeting, there were
18 speakers of all kinds and I was doing whatever I was doing
19 there and many, many people came up to me to praise the young
20 men who went to Somalia.

21 Now, one way to look at that is it's frightening
22 because all these other young men are going to go, but the
23 other way is to think of what it's like to live in a community
24 where many people -- I don't mean to speak for all people in
25 Somalia, but many people at least think that something has to

1 be done about what's going on in Somalia, about the invaders,
2 and this was, of course, after he was here. I had no occasion
3 to visit before he was here. And I say that because where he
4 came from in Stockholm, what he did, first of all, was not
5 criminal under Swedish law and was thought of as honorable by
6 people in the community.

7 I've also had a lot of conversations with him. I am
8 not a person of faith and he is and he would talk to me about
9 what it meant to have faith and how surprised he was that I
10 didn't and in those conversations, he referred to his faith as
11 a light that is seen through what I think everyone agrees are
12 very difficult situations. I think the situation in Somalia
13 was very difficult. It was dangerous and frightening. He was
14 under fire and he was firing at people and he feels that his
15 faith saw him through that. When he was held in Djibouti and
16 things that you're well aware of happened to him in Djibouti,
17 he felt that his faith saw him through that and he felt that
18 his faith saw him through the years that he's been here in the
19 United States and I think that's what we expect faith to do.
20 We expect faith to be a guide in difficult times among other
21 things. So, it's one thing for the government to characterize
22 what they think the philosophy of al-Shabaab is, but that
23 characterization does not apply to Mr. Yusuf's personal
24 philosophy.

25 He also thinks very deeply about his faith and what

1 it meant when he went, what he thought when he went, and I
2 mean went to Somalia, and how he felt that that was a way of
3 expressing his faith even though he did it at great personal
4 risk and at real pain to his family.

5 The government, I think, belittles the letter that
6 Mr. Yusuf wrote saying it's too little, too late, or it's just
7 to get out of trouble, but they don't have the advantage I
8 have of knowing him and of having seen his thinking evolve.

9 He knows that now he has changed, he's older, he's
10 experienced new things, and he knows the situation in Somalia
11 has changed and that he no longer has a role there and it's
12 his belief that at least young men from Stockholm have no role
13 there. He has said to you and he has said to me that he would
14 counsel young men against going there because it didn't
15 accomplish anything and there are better ways for them to
16 express their faith in a way that's more useful to everyone.

17 One of the things that we most often look at in
18 sentencing is whether or not a person has a place to go back
19 to, that is, whether or not when they get out of jail, they're
20 going to be in a place where they'll be supported and cared
21 for and loved. He certainly has that. I've spoken with many
22 members of his family, we've given you letters from some of
23 them, and they're all eager to have him come back and will do
24 all they can to reintegrate him into the community.

25 He hopes when he gets back to express one of the

1 highest values of Islam by caring for his family. He has a
2 wife and children in Somalia and he hopes to bring them back
3 to Sweden which he can only do once he is in Sweden. I think
4 under Swedish law, he has a right to bring his family there
5 but not if he himself is not there. So that he hopes that
6 when he gets back to Sweden, to bring his family there and to
7 let his children take advantage of all of the things the west
8 has to offer. Where they live now, I think it's difficult.
9 The health care is poor. The educational opportunities are
10 poor. He knows that he benefited from the opportunity to grow
11 up in a western country and it's fair to say that he has no
12 animus whatsoever towards the west, towards Sweden, towards
13 the United States. His fight was in Somalia.

14 Another thing I've learned from meeting him is that
15 he's a person who is open to new ideas. The government has
16 the disadvantage of only meeting defendants really when
17 they're either cooperating and have a motive to tell them
18 things -- I don't mean untrue things but they have power over
19 them -- or when they're pleading guilty, things like that, but
20 I've had the chance to spend many, many, many hours talking to
21 Mr. Yusuf, talking about the plea which eventually we were
22 able to get in this case, talking about what it was like for
23 him in jail, talking about how much he misses his family, and
24 he's learned a lot sadly from being in jail.

25 You know, one of the things he learned is who

1 Americans are. When you're not here, you hear lots of
2 opinions from lots of people about who Americans are and what
3 Americans are and he's learned for himself that he came to
4 this country, he was brought to this country, he met lawyers
5 who, for better or for worse, did their best for him, he met
6 jailers who, for the most part, were kind to him, and under
7 very difficult circumstances, he's learned that America is not
8 a bad place to be even in jail, not that he wishes to be in
9 jail, but that it's a humane place where people are given food
10 and commissaries and treated for the most part with respect.

11 He has many, many traits that we all admire in
12 people. One of the things about him is that he is not a
13 whiner or a complainer and I don't say that lightly because
14 having represented many, many people over the years, some are
15 not as uncomplaining as others, but when Ms. Smith and I would
16 go see him, he never ever complained. He was held under
17 circumstances that I would certainly be whining about. He
18 never complains. He would come out with a smile on his face.
19 He would greet the people in the facility and they would greet
20 him. He would ask us why we were there and talk with us about
21 why we were there. He never demanded things from us. He was
22 a person who took what life brought him with equanimity and
23 didn't ever complain.

24 He's also a person who is always grateful and
25 polite. There are plenty of clients for whom I have tried to

1 do things who, for whatever reason, for whatever damage
2 they've suffered, don't have it in them to be what I'm going
3 to loosely call appropriate. He always, whatever we did for
4 him, was sure to thank us and sure to make sure that we felt
5 good which many clients don't really consider.

6 I think it's also fair to say that there's not any
7 indication that he's a dishonest person. The government might
8 not like what he did, but I don't think they would
9 characterize him as a liar.

10 One of the most impressive things about him and
11 about his co-defendants is they are good friends to one
12 another. They wanted to make decisions together. They never
13 wanted one to be left behind. They were, for example, very
14 concerned about Mr. Hashi because they both know that whatever
15 sentence they would receive, they have a home to go back to,
16 they go back to Sweden, but Mr. Hashi really has nowhere and
17 they would say, Mohamed would say, I'll take a longer sentence
18 if Hashi can get a shorter sentence because at least I have a
19 family and a home to go back to and he has nothing.

20 I've talked about him as being an open person and
21 one of the ways in which he's open is wanting to learn things
22 outside of his own world and maybe this seems insignificant to
23 you, I really don't know, but he would ask us for magazines,
24 he wanted National Geographic, he wanted history magazines
25 because he wanted to continue to learn and not just to

1 continue to believe and think the things he had always
2 thought.

3 The government in part of their presentation to you
4 wrote about things they had done wrong in jail. The truth
5 about him is that he has been a model prisoner. The only
6 thing they could dig up is to say that he once told his mom
7 that some of the evidence in the case against him was
8 conversations he had with his long time friend Mr. Ahmed and
9 that hardly seems like misbehavior to tell your mom what the
10 evidence in the case is against you.

11 And, finally, maybe in some ways most tellingly, he
12 had a very, very good relationship with prison personnel. We
13 would go there and officers would say to us, oh, he's so easy,
14 he's so nice. He would talk to them. They would talk to him.
15 He wasn't like clients that have a difficult time getting
16 along with prison personnel. He was a person who respected
17 them and they respected him.

18 I say all of this by saying he needs no more
19 deterrence. He's being punished for something he had no idea
20 was a crime in the U.S. in the first place but now he knows
21 and he's being punished for something that was not a crime in
22 his own country so he wasn't really on notice that he would
23 ever be prosecuted for it. He recognizes it's a crime here.
24 He pled guilty to what he now knows is a crime here. I would
25 say the nearly four years he's been in custody has certainly

1 made him aware of that and that nothing he's done has made
2 anyone think he'll be a continuing threat should he get out of
3 jail.

4 One of the considerations in sentencing is general
5 deterrence and I wanted to talk a little bit about that.

6 There are, I think, and I took this off the internet
7 so you could take them with whatever grain of salt you want,
8 something like 7 to 9,000 members of al-Shabaab and in the
9 government's view, all of them are co-conspirators. Every
10 member of al-Shabaab is in a conspiracy with Mohamed Yusuf and
11 maybe that's legally true, maybe not, we didn't end up having
12 to litigate it, but the fact is that the U.S. is not going to
13 bring 7,000 or 5,000 or 2,000 or 1,000 al-Shabaab members here
14 and prosecute them.

15 So, sitting where he sits now is like being struck
16 by lightning. He's the one guy, one of three guys, and I know
17 there's more than three, but one of a small number who get
18 picked up and brought here and I don't really think that for
19 the most part, young men fighting in Somalia are paying that
20 much attention to what happened to him. Many of them are
21 there for the same reasons he was there and maybe they're
22 beyond deterrence, but to the extent that any of them can be
23 deterred, we should send out a message to them that is
24 measured: If you didn't know, you know now, and this is what
25 happens to people, we mete out compassionate sentences for

1 people who didn't know what they were doing was a crime.

2 It was strange to me that the U.S. can reach across
3 the ocean and bring someone back here and have jurisdiction
4 wherever they land with them. One of the first things he said
5 to me is, What am I doing here? I'm where, in New York? How
6 did I end up in New York? And I really consider it to be a
7 fair question, but not one that is an attack on the
8 jurisdiction, we don't have to resolve that, but only to say
9 it's unusual to me and to him and I assume the people over
10 there, but if we reach out and get the people who attacked
11 civilians and we reach out and get people who do beheadings,
12 and we reach out and get people who attack outside their own
13 country, I think everyone knows you're not allowed to do that.
14 What they don't know and maybe will know now to the extent
15 this is a covered is this is something they're not allowed to
16 do.

17 I think when everything is balanced in this case,
18 Mr. Yusuf does not deserve a long sentence. I don't intend to
19 talk at length about the conditions he's been under, but I
20 think it's at least worth noting that in Djibouti, and I
21 assume you've seen the affidavits that were filed by these
22 defendants, he was held in very, very difficult conditions and
23 then being held here under the conditions which he's been held
24 makes every day of a sentence much more difficult than most
25 people have to live through.

1 He had 15-minute phone calls with his family every
2 month -- 30 minutes every month. I'm sorry. He would spend
3 15 minutes with his wife and 15 minutes with his family.
4 They're in different places so he would call in different
5 places. He really had no one to talk to other than us and
6 prison personnel. So, punishment is, of course, part of the
7 goal of sentencing and he has been punished.

8 In the end, we ask you to sentence him to a sentence
9 well below the 15-year maximum in this case. We also ask,
10 although I know it's unusual, that you recommend to the
11 Department of Justice that at the earliest opportunity, he be
12 sent back to Sweden to serve the remainder of his sentence.
13 We know you can't order that, but we ask that for two reasons.
14 Well, three reasons. One is his family is in Sweden and it's
15 extremely difficult to visit. Another is Swedish prisons
16 offer education and he very much wants to further his
17 education while he's in jail. And, finally, to the extent we
18 want people to be reintegrated into society and become active
19 and participating members of society, it's much more likely to
20 happen if he's able to complete his sentence in Sweden where
21 he's from and where the Swedes will, however they do it, work
22 on his reintegration.

23 I think unless you have questions, that's all we
24 have to say about sentencing in this case.

25 THE COURT: Is there an understanding, an agreement

1 between the United States and Sweden about transferring
2 prisoners?

3 MR. STERN: Well, it has to be on the agreement of
4 both parties. I have reason to believe Sweden will certainly
5 agree. Whether the U.S. does or not, they're not agreeing at
6 this moment, and whether they will, I have no way of knowing.

7 THE COURT: I'm only familiar with this anecdotally
8 through a couple of other cases, but do you know whether,
9 assuming you get what you want, whether there is some analogy
10 to parole or what it does to sentence length if he gets sent
11 to Sweden?

12 MR. STERN: I think, and the government will correct
13 me if I'm wrong on this, I think they would only be sent to
14 Sweden if Sweden would effectuate the same sentence they were
15 getting here. I don't think they'll send you somewhere
16 knowing that the day you get there, you're going to be let go.
17 The government will correct me if I'm wrong, but that's my
18 understanding.

19 THE COURT: My only other experience really was with
20 Israel where they did shorten the sentence but understood.
21 I'll hear from the government in a minute.

22 Thank you, Mr. Stern.

23 Mr. Yusuf, you have a right to speak before sentence
24 is imposed. Is there anything you want to say?

25 MR. YUSUF: I think my attorney has said everything

1 that needs to be said and I also wrote a letter.

2 THE COURT: Yes, I read your letter. Thank you for
3 it. Okay. Thank you, sir.

4 Ms. Kellman?

5 MS. KELLMAN: Your Honor, may I have just one
6 personal request. With the Court's permission, may I sit? I
7 messed up my ankle.

8 THE COURT: Yes, of course.

9 MS. KELLMAN: Thank you, Judge.

10 Your Honor, in preparing my remarks today on behalf
11 of my client, I wanted very much to try to speak with his
12 voice instead of mine because I know my voice irritates a lot
13 of people and I thought that it might be helpful for the Court
14 to hear what I think my client would say if he were
15 representing himself and I talked to him a lot about trying --

16 THE COURT: Excuse me. One second.
17 Could you turn your mic off over there?

18 MR. STERN: Sorry.

19 THE COURT: Or stop talking. That's another option.

20 MR. STERN: I'll do both.

21 THE COURT: Okay. Sorry, Ms. Kellman. Go ahead.

22 MS. KELLMAN: Thank you, Judge.

23 So I thought if Mr. Ahmed were to speak for himself,
24 Judge, that he would want you very much to understand what
25 brought him today to this place and this time in his life and

1 he would speak with a kind of patience and the kind of grace
2 and dignity that I really don't have often when I speak in
3 public.

4 I echo some of what Mr. Stern has said, that my
5 client is and has been since I met him remarkably polite,
6 always respectful, and as frustrated as I often got with the
7 conditions of his confinement, it was he who always said
8 they're doing the best that they can and often urged me not to
9 intercede on his behalf. I think that that is very much a
10 measure of who he is and I hope that through my remarks today,
11 that I'll be able to help the Court understand better about
12 who the young man who stands before him awaiting judgment is.

13 I think that the very first thing that my client
14 would say if he were to speak on his own behalf is that he
15 would say that he can't honestly apologize for his trip to
16 Somalia and his actions in Somalia and he would hope that he
17 could make the Court understand his motivations for traveling
18 to his homeland.

19 He would hope that the Court would understand as a
20 young Somali male, he was forced to flee his homeland which
21 was in the midst of a very difficult and tumultuous civil war.
22 He left with the protection of an older sister leaving behind
23 his younger brother and his mother and at the time he left,
24 Judge, he was six years old. It would be years before he
25 would be reunited with his mother, years of learning new

1 customs and a new language without a father, without a trade,
2 without money. He went to school where nobody looked like him
3 and nobody spoke like him and nobody dressed like him.

4 As you read the letters from his family, Judge, you
5 will learn or have learned that he's a committed member of a
6 close-knit family and a close-knit community, both of which
7 things are important in the Court's consideration of the
8 ultimate sentence. He is someone who is loved, he is someone
9 who is cared for, but he's also somebody who returns the
10 emotion. You read letters from his family that he often was
11 called upon to care for and babysit for his younger nieces and
12 nephews, that he tutored them and he tutored other members of
13 the community at a community center because he was a good
14 student.

15 You read that he intervened on behalf of a woman and
16 rescued her from a robbery and that his own reaction, when he
17 was honored by his community and by the local police, was
18 pride and for him it felt like the first time he really
19 understood that he was a member of not only the Somali
20 community, but also of the broader Swedish community. It was
21 something that made him feel very connected to the world
22 around him.

23 As he grew, Your Honor, he learned, he became more
24 aware of the world around him and he became increasingly aware
25 of the turmoil in his homeland, Somalia, a turmoil and a kind

1 of crisis that he had left behind a decade earlier when he was
2 a young child fleeing through other African nations and he
3 determined that the appropriate thing for him was to return to
4 Somalia to fight.

5 The government in its submission says that the
6 justification that he gave for returning to Somalia just
7 doesn't hold water and I think that the Court correctly
8 characterizes this as one of the things that it must decide
9 here as to whether or not these were the acts of terrorists or
10 the acts of freedom fighters.

11 My client has explained to me from the very
12 beginning that as Sweden welcomed more and more refugees into
13 its arms and into its midst in the early years, 2006, 2007,
14 that he began to learn more and more about the turmoil and the
15 tragedy that was being, that his people were experiencing in
16 Somalia. He learned daily about the, the events that were
17 leading to the deaths of hundreds and thousands of civilians
18 during the incursion that was initiated again by the
19 Ethiopians. I say again because while the government is
20 focused on an earlier incursion they refer to as limited, they
21 also have not nor do we need to here trace the entire history
22 of the relationship between Ethiopia and Somalia, but in
23 reading the government's own expert, Matthew Bryden, we
24 learned that the incursions by Ethiopia into Somalia spanned
25 the course of the century, not just a few decades.

1 And so the motivation behind my client's trip, while
2 I don't think he can pinpoint it with exact accuracy, I think
3 it's very clear that he was motivated by the Ethiopian
4 invasion into his country and the formulation of the TFG, the
5 transitional government that was formed in exile not
6 authorized by the United States Security Council according to
7 the government's own expert and viewed by the Somalians as an
8 illegitimate government. It was this invasion and this
9 incursion, Judge, that led to the massive civilian casualties
10 at the hands of the Ethiopians that led so many Somalis to
11 flee to other countries in the world and, specifically,
12 Somalia where our client got to view these firsthand and it
13 was the notion that people who weren't as lucky as he was
14 weren't able to survive and had to remain without the help
15 they needed in Somalia.

16 It was that, Judge, that motivated him to go to
17 Somalia and try to make a difference because he realized that
18 even as a child, as he fled, I don't think it would be fair to
19 say that he felt like he was one of the lucky people, but as a
20 teenager and more as he matures, he began to understand that
21 he was one of the lucky ones because he had a life and he had
22 a way of being with his family and feeling the love that comes
23 from a family and not living in a war-torn country anymore.

24 The government makes a lot of submissions about
25 different contacts or people that he was in touch with or

1 people that he knew, people that he knew in passing, and I
2 think the Court has appropriately said that to the extent that
3 many people in al-Shabaab did things that this defendant did
4 not do and was associated with and the Court will not
5 appropriately take them into consideration. At the same time,
6 I feel the need to at least comment on the government's
7 repeated accusations with respect to his brother.

8 I say that, Your Honor, because for one, while the
9 government points out that his brother traveled a great deal
10 back and forth to Somalia, and that our client spoke with his
11 brother before he left for Somalia, I think it's important to
12 note that the trips notwithstanding, that his brother has
13 returned to Sweden and that he continues to travel back and
14 forth between Somalia and Sweden, but then he also maintains
15 full-time employment as a bus driver, a municipal employee in
16 Somalia -- I'm sorry, in Sweden. I apologize, Judge. And
17 that it's his ability to return to a life of normalcy that
18 keeps my client going on a daily basis.

19 When he talks to his brother and he talks to his
20 family and he hears about normal family life, he yearns for
21 that, he yearns for the ability to return to his family and to
22 the people who love him. He too has a family, a wife and a
23 child, in Somalia and he hopes one day when he's back in
24 Sweden to be able to be reunited with his family.

25 I want to speak briefly, Judge, about the conditions

1 of my client's confinement and I think that the conditions of
2 his confinement are relevant to the Court's sentencing
3 considerations as Your Honor has acknowledged and I want to
4 speak to the government's I'll call it back-handed
5 representation of the rough, rough treatment that our clients
6 experienced when they were in Somalia and, when they were in
7 Djibouti, rather, and here at the BOP.

8 I think that to use the word "rough" is unfair and
9 dismissive. When our clients were in Somalia, Your Honor,
10 they, they experienced extremely difficult circumstances, some
11 of which the government can confirm and some of which I think
12 they would never deny. They can certainly confirm the extreme
13 heat in Djibouti and the notion that six people shared a
14 single cell in this heat is and of itself excruciating.

15 The government was there. They can't refute that.
16 They can't refute that there were five other near naked men in
17 our client's, in Mr. Ahmed's cell, no mattress, no change of
18 underwear, no change of clothing, over the course of three
19 months. The government calls this rough but nothing more. I
20 think it's more properly characterized, Your Honor,
21 respectfully, as inhumane.

22 The government can't refute the fact that Mr. Ahmed
23 sustained himself on the only water that was available to him
24 and that was water from the toilet that he and five other men
25 shared. Rough treatment or inhumane? Or the fact that he was

1 hung upside down and beaten with computer cables so that other
2 inmates could watch it. I think that that kind of treatment,
3 Your Honor, is easily characterized as inhumane.

4 When my client arrived here in the United States, he
5 wasn't able to hold food down. He suffered from stomach
6 ailments that he hadn't had before he was forced to drink
7 toilet water in order to survive. When he got to the United
8 States, Judge, he had a terrible cough and for weeks, in fact,
9 months, he coughed to a point where it was difficult for him
10 to communicate with his lawyers. And while busy Brooklynites
11 were freaking out in the streets of Sunset Park because they
12 couldn't find parking, Ali was coughing in his cell in a way
13 that made it impossible for him to communicate. Rough
14 treatment or inhumane?

15 The ailment that was overlooked at the MDC, Your
16 Honor, turned out to be tuberculosis and my client was then
17 hospitalized for several weeks until the condition could be
18 under control.

19 My client early on, Judge, was at the MDC, this was
20 prior to Your Honor's taking over of this case, but while he
21 was at the MDC, he also was in SAMs custody and it appeared to
22 him at least that at the time, there was no SAMs unit at the
23 MDC and there was nobody who was assigned to his particular
24 unit and so on the weekends, he often wasn't fed. He was fed
25 during the week because he had developed a relationship with a

1 lieutenant at the MDC who made sure that he was fed although
2 it was after all of the other inmates were fed.

3 He suffered when he was at the MDC, Judge, and there
4 came a time when he cut himself causing himself to lose a
5 considerable amount of blood. The institution's response for
6 that was to take away the 15 minutes a month that he was
7 entitled to call his family and have some human connection.
8 So he suffered additional punishment.

9 Recently, the former New York City Corrections
10 Commissioner Bernie Kerik was released from federal prison and
11 he complained publicly that he was incarcerated in solitary
12 confinement for 90 days. He said that it was inhumane and
13 that it was unconstitutional and that he almost, it almost
14 drove him to be insane.

15 These young men, Your Honor, have been in solitary
16 confinement for almost four years, confinement that is
17 recognized by the entire world as torture. My client has
18 explained to me how insular he feels. He has really tried so
19 hard, Judge, in his letter to the Court to explain how
20 difficult the process of writing to Your Honor actually was
21 for him.

22 As his attorneys, we told him and counseled him that
23 we thought it was best if Your Honor can hear his voice and
24 hear what was happening in his head and we worked with him for
25 a period of months trying to get him to communicate his

1 thoughts and writing. One of the things that he told us,
2 Judge, was that in order to survive in solitary confinement,
3 he had to turn himself off emotionally and in having to write
4 to Your Honor, he had to turn himself back on and he feared
5 what would happen if he did that, he feared what would happen
6 if he couldn't turn himself back off. He explained to us that
7 there were skills, emotional skills, triggers that he hadn't
8 felt in years and that he didn't know, that he was almost too
9 afraid to feel those things again.

10 Experts have told us, Judge, and we've recited it in
11 our papers to you that the emotional damage that's caused by
12 solitary confinement often isn't even detected or develops
13 after somebody leaves solitary confinement.

14 I think that the conditions of his confinement, of
15 both of these young men's confinement have been horrific,
16 Judge. They were horrific in Djibouti. They weren't much
17 better here in the United States. And while there were, as
18 Mr. Stern points out, jailers who really felt compassion for
19 them, they felt compassion for them because of the extreme
20 conditions under which they were jailed.

21 I remember an incident one time when I was sitting
22 with my client trying to make a particular point through the
23 mesh where I really couldn't really see his face at the MDC
24 and afterwards, I said to the guard, a lieutenant who was
25 there with us, when he comes out of the cage, would you do me

1 a favor and just give him a crack in the head, like just make
2 sure that he's there, make sure he's heard what I've said.
3 They almost never open the cage when I'm there, but as I was
4 leaving the area, the cage was, in fact, opened and I saw the
5 guard put his arm around my client's throat and in a very
6 caring way, give him what I call a noogie, just let him have a
7 moment of human contact, and I saw my client's eyes glaze over
8 and I thought to myself what are we doing to human beings here
9 in Brooklyn.

10 Your Honor, there came a time when I learned that
11 one of my client's two children had passed away, a baby who he
12 had never gotten to see, and I remember going up to the MDC
13 with so much trepidation about how I was going to tell him
14 about it and I rehearsed different ways of trying to make that
15 kind of news humane. If you want to understand my client,
16 Judge, and I'll close with this, I think the best way to
17 understand it is he saw how difficult it was for me to be able
18 to say this to him and he spent the next ten minutes that we
19 were together trying to comfort me for having to explain his
20 loss to him.

21 The man I've come to know, Your Honor, is a gentle
22 and intelligent human being who left a comfortable life
23 because he thought it was the right thing to do because he
24 wanted to help people in his country. After two years of
25 battling in Somalia, he met a woman, he married her and they

1 had children together. He was making a life for himself and
2 that life has completely been obliterated. It's a woman who,
3 a wife he hasn't been able to speak to since he's been
4 incarcerated. He explained, I think, in his own letter to
5 you, Judge, that he, when he was in Djibouti, not only did he
6 have no idea why he was there, but he had no idea if he would
7 ever get out of there. He explains the way he trembled and
8 the terror that he fought every day so he could survive to the
9 next day. With those things in my mind, Judge, the thing that
10 I can't get out of my mind is how upset he was that I was
11 upset at having to break the news to him about the child he
12 had lost.

13 I know that Your Honor will balance all of the
14 factors that 3553 dictates and I pray that Your Honor will
15 have the courage and the strength to impose a sentence of time
16 served on this young man. I think it's appropriate under
17 these circumstances. I think he's earned it and I think he
18 deserves it.

19 Thank you, Judge.

20 THE COURT: All right. Thank you, Ms. Kellman.

21 Mr. Ahmed, you have a right to speak. Anything you
22 want to say to me before sentence is imposed?

23 DEFENDANT AHMED: I hope my attorney has expressed
24 everything that has to be said and she did, my letters and the
25 letters from my family expressed. I only want to say thank

1 you. Thank you.

2 THE COURT: All right. Thank you.

3 Mr. Ariail?

4 MR. ARIAIL: Your Honor, I think at the outset, I
5 think the appropriate thing at this point would be to address
6 the plea that was reached in this case.

7 As Your Honor recalls, you did not accept the plea
8 at the time of the guilty plea and that's significant. It's
9 very significant for purposes of the government's position
10 with respect to these defendants because what we have here is
11 a negotiated resolution.

12 This was a case, if Your Honor recalls, where there
13 were multiple charges related to material support, there are
14 weapons charges that would require these defendants to be
15 sentenced to 30 years mandatory minimums in prison, and what
16 we arose at before trial was a negotiated resolution that in
17 the government's opinion, was the right resolution for this
18 case.

19 All three defendants pleaded guilty. They accepted
20 responsibility at least for the crimes that they were charged
21 with, the elements of those crimes, before a jury had been
22 impaneled. There was a global disposition. This is an
23 extraordinarily complex case. The defendants' conduct as they
24 pointed out was extraterritorial. It was not specifically
25 directed at the United States or Americans. And the need for

1 just punishment in our prison system was mitigated to some
2 extent by the treatment they received in foreign custody along
3 with their agreement to be removed from the United States for
4 both of these defendants to Sweden.

5 Given those circumstances and given the highly
6 unusual circumstances that surrounded this case, that's the
7 right thing to do. That plea should be accepted and I ask
8 Your Honor to do that.

9 THE COURT: All right. I will, I will say this. To
10 the extent you are suggesting that you did the judging and it
11 should stop there, there is a way to effectuate that through
12 11(c)(1)(C). You know that.

13 MR. ARIAIL: I do, Your Honor, and I'm not
14 suggesting that, Your Honor, that we supplant Your Honor in
15 doing the judging. I'm just communicating to the Court the
16 considerations that this government took in fashioning the
17 sentence.

18 THE COURT: I understand.

19 MR. ARIAIL: And that's a significant point, I
20 think, that we want to make.

21 THE COURT: Yes, it's part of your job, but it's
22 important to me for you to understand that even if some
23 considerations that are identical to the considerations that
24 go into the judging that results in a sentence go into your
25 plea agreement, that it's important to understand that in a

1 circumstance like this, the judging is not over.

2 MR. ARIAIL: Understood, Your Honor.

3 THE COURT: So, I accept under Rule 6B1.2, I accept
4 the agreement which was a charge bargain --

5 MR. ARIAIL: And --

6 THE COURT: Sorry. Let me just briefly make the
7 record that no one ever makes including me but I will make it
8 here.

9 This is a charge bargain under 6B1.2(a) which says I
10 may accept it if I determine for reasons stated on the record
11 that the remaining charges adequately reflect the
12 seriousness -- "the remaining charges" meaning the charges he
13 pled guilty to -- adequately reflect the seriousness of the
14 actual offense behavior and that accepting the agreement will
15 not undermine the statutory purposes of sentencing or the
16 sentencing guidelines.

17 I so find because it is a complicated case. It
18 doesn't involve nuanced considerations. There's no binary
19 dimension to this at all. By that, I don't mean to buy into
20 any notion that these men were either freedom fighters or
21 terrorists, they are a little bit of both, and there are ample
22 reasons for the government to have exercised its discretion in
23 a way that inures to their benefit.

24 Whether they get more benefit than the 15-year cap
25 is what we are here for, but I think the wisdom that went into

1 this plea agreement from the government's perspective is clear
2 and it deserves deference so I accept the agreement.

3 Sorry. Go ahead.

4 MR. ARIAIL: Thank you, Your Honor.

5 And I guess I would start to the extent that
6 Mr. Stern characterized this as a case that people don't care
7 about, I would respectfully disagree with that position. I
8 can tell you there are a dozen people in the back of this room
9 who worked for the United States Government with the FBI and
10 they are here because they care immensely about it. They care
11 immensely about it because it is their duty and it is our duty
12 as the Department of Justice to be a part of the apparatus
13 that exists in this world to stop folks from harming one
14 another through international terrorism. It's a significant
15 role that we play and it is an important one.

16 In this case, I just want to talk a little bit about
17 this concept at least initially of freedom fighters because
18 we've had a number of comments from both sides about their
19 claim, these defendants' claims, and obviously Your Honor
20 finds it rather significant.

21 From the government's perspective, I think there's a
22 disconnect between the evidence, the facts that are laid out
23 in the PSR with respect to these defendants and that notion,
24 that notion that these men were going to Somalia with the
25 desire to do something to help.

1 Mr. Ahmed said, I felt a growing obligation to go
2 there and defend my people against Ethiopia. We talked a lot
3 about Ethiopia. In Mr. Yusuf's words, he claims he's not a
4 violent person or a fanatic. The reason he said he went to
5 Somalia was to help his people with political
6 self-determination and out of profound concern for the safety
7 and security and the future of Somalia. I put this in context
8 with the objections that the defense has made to the PSR
9 because I do think they are rather important.

10 The reason that the defendants in this case have so
11 strenuously objected to various pieces of evidence that are
12 articulated in the PSR and the government's submissions is
13 that the information in the wiretaps, in the videos, in the
14 testimony of the witnesses in the various countries where we
15 did Rule 15 depositions fundamentally underlines that notion
16 and I think it does away with that theory of mitigation nearly
17 entirely and also serves to show that these defendants I don't
18 think have fully accepted responsibility for what it is they
19 did.

20 They talked today about Ethiopia, they talked about
21 political self-determination, but if you listen to the
22 recordings, review the reports from 2008 before they left,
23 never once did they talk about Ethiopia, never once did they
24 talk about political self-determination, never once did they
25 talk about helping the people of Somalia.

1 What they do talk about is they talk about speeches
2 by members of al-Shabaab. Mohamed Yusuf talks about how
3 Mukhtar Robow's speech, a significant member of al-Shabaab's
4 speech made his blood boil so badly that he cried while
5 watching it. They talked about how while driving a taxi is
6 forbidden in Islam because they might have to pick up a
7 homosexual and drive him around Stockholm. They get excited
8 about people throwing stones at buses in Stockholm. They get
9 excited about the idea that Shabaab is whipping people
10 exacting sharia law in Mogadishu. Yusuf unequivocally,
11 unequivocally explains that he made his decision to go to
12 Somalia to join al-Shabaab because life on earth is short and
13 life in paradise is eternal. They are upset that other
14 Muslims don't support the idea that we should stone unfaithful
15 women.

16 Most assertively, they talk about a suicide bombing
17 attack that was carried out in October of 2008 on Bosaso and
18 Hargeisa carried out by six suicide bombers against a United
19 Nations facility. Dozens of people were killed, innocent
20 civilians, and they have some sort of a subtle debate about
21 whether or not that is a forgivable sin. Ahmed says it is a
22 forgivable sin and compares it to an act that I will not
23 mention here but is obscene.

24 The calls from 2008, the audiotapes from 2009 and
25 2010 that they didn't realize the Swedish government was

1 listening to, they squarely placed the defendants in an
2 al-Shabaab training camp with Mugisha Mahmoud, a participant
3 in the July 2010 attacks in Kampala. They put themselves, the
4 wiretaps put them in a training camp with Yassin Yare,
5 Sheikh Yahye, a cleric, a close friend whose idea about
6 jihadists' intentions didn't relate just to Somalia, but with
7 a global vision: Once you finish in Somalia, you go elsewhere
8 in the world to fight.

9 Mr. Yusuf was captured on a video, a piece of
10 propaganda which was put out by al-Shabaab recruiting other
11 young Muslim men from around the world, Europe, the United
12 States, to come to Somalia and, in his own words, to embrace
13 the death wish of jihad in Somalia, to take part in this
14 blessed jihad which is between good and evil, between light
15 and darkness and between truth and falsehood.

16 He mimics and he threatens the death of Lars Vilks
17 who he claims was behind the caricatures defaming the prophet,
18 and I quote: "I say to Lars Vilks that wherever you are, if
19 not today or tomorrow, know that we haven't forgotten about
20 you. We will get ahold of you and with Allah's permission, we
21 will catch you wherever you are in whatever hole you are
22 hiding Inshallah, know what waits you, as it will be nothing
23 but this. It will be slaughter for that is what you deserve.
24 To my brothers and sisters, I call you to make Hijra and if
25 you can kill this dog Lars Vilks, then you will receive a

1 great reward from Allah."

2 So these claims that they make about why they were
3 going to Somalia, they don't hold up if you look at the
4 evidence and the testimony that we put forth in the PSR.

5 Now, to the extent that Mr. Yusuf argues that he was
6 somehow not aware that what he was doing was illegal, he does
7 appear, although he doesn't claim to be seeking to relitigate
8 his due process claims before the court, he has admitted that
9 he knew what he was going to do was illegal. We would
10 respectfully disagree with the idea that what he did was not
11 illegal in Sweden at that time. Just the other day, two men
12 were convicted and sentenced in Sweden to life in prison for
13 conduct very similar to that carried out by Mr. Yusuf and
14 Mr. Ahmed.

15 With respect to the treatment, Your Honor, the
16 treatment that these men suffered, as I've indicated to you
17 before, we took that into significant consideration when we
18 fashioned a plea in this case, both from an evidentiary
19 perspective and both from a mitigation perspective with
20 respect to these defendants. The treatment that they received
21 while brief was unconscionable and inappropriate. We do not
22 condone it.

23 THE COURT: Going forward, what is their custody
24 going to look like once they are designated out? Is it going
25 to differ in kind from the conditions of their confinement of

1 their pretrial detention?

2 MR. ARIAIL: Certainly, Your Honor. There's a
3 couple of different things that can play out in terms of where
4 they're getting sentenced.

5 First of all, the SAM restrictions that the
6 defendants are under, they're up for reconsideration in
7 April 2016. I don't have an answer for the court in terms of
8 whether they would be continued under SAM, but if they are
9 continued under SAM, they won't be continued under SAM within
10 the detention facilities that they're currently in and the
11 facilities that they could go to, they would be afforded other
12 opportunities to interact with inmates outside of the
13 restricted conditions that they're currently in.

14 So, yes, I think that there's a high -- it's highly
15 likely that the conditions when they ultimately get sentenced
16 will be much better than they are right now.

17 THE COURT: And when you look just at the offense
18 behavior, is there any reason in your judgment to
19 differentiate between the two?

20 MR. ARIAIL: Between the two, I don't think that, on
21 the whole, there is a distinction. Obviously there are
22 particular things that the Court can consider.

23 So, for example, Mr. Ahmed appears to be the one who
24 convinced Mr. Yusuf to travel. I think that's significant.
25 Mr. Yusuf, however, when he arrived in Somalia, rose in rank

1 within al-Shabaab and was more of a leadership figure there.
2 But, no, generally, no.

3 I think, Your Honor, in this case, as always,
4 deterrence is a significant factor and as I stand before you
5 today, obviously, I don't know what's going through the minds
6 of these men, but I can't help but think how much the words
7 here today that they say, their characterization of their
8 conduct then and now is at odds with the evidence, the
9 wiretaps, the videos, the conversations and the actions that
10 were revealed by the cooperating witnesses who fought
11 alongside of them, and I seriously doubt that their arrest and
12 incarceration has actually changed their perspective.

13 I think that 15 years from now, they will continue
14 to adhere to the same twisted version of Islam that they have
15 been shown to adhere to and I don't have any doubt that when
16 they're released, that they will, if not return to some
17 battlefield to fight jihad, they will likely seek to recruit
18 others to join organizations like al-Shabaab and I think a
19 message needs to be sent here in this case. Deterrence is
20 important, not just specific deterrence for these individuals,
21 but deterrence to others who would join groups like
22 al-Shabaab, in particular, in this case, many of the Americans
23 who live in Minneapolis and other parts of the country who
24 would think seriously about joining that organization.

25 This was, as I said before, a difficult case and the

1 decision to resolve this case in the manner that we did took
2 into account all of the issues that have been raised before
3 the Court today.

4 I can tell you there are many folks here who do not
5 believe that a 15-year sentence is adequate to address and to
6 appropriately deter these defendants. I can tell you that
7 there are many people here who think a 15-year sentence will
8 not afford the appropriate protection of the public for the
9 crimes, from further crimes. Personally, I sympathize with
10 those folks because I actually believe they're right, but as
11 the Court knows, we don't make these decisions on our own. We
12 make these decisions in consultation with our supervisors, the
13 Department of Justice, the Federal Bureau of Investigation,
14 our intelligence partners around the world and we have taken
15 all of these issues extraordinarily seriously. I think every
16 single one of us who agreed to the resolution in this case did
17 agree with the full expectation that the defendants would be
18 sentenced to 15 years and thereafter be deported without
19 litigation and that's the bargain we struck.

20 THE COURT: No, it's not.

21 MR. ARIAIL: That we struck, Your Honor, I
22 apologize, ourselves.

23 THE COURT: Yes.

24 MR. ARIAIL: I understand, Your Honor.

25 THE COURT: Right.

1 MR. ARIAIL: I believe though seriously that we have
2 done the hard work. I understand that obviously it is
3 Your Honor's discretion in sentencing, but I think we have
4 thought long and hard about this and I respectfully request
5 that the Court take that into very serious consideration in
6 fashioning a sentence and I recommend the Court sentence these
7 defendants to 15 years in prison. I don't think it's a hard
8 thing to do. I think it's a straightforward decision for the
9 Court to make.

10 THE COURT: Thank you.

11 MR. ARIAIL: You're welcome, Your Honor.

12 THE COURT: Anything further from the defendants?

13 MS. KELLMAN: Very briefly, if I may, Judge.

14 I mean I don't think I have to comment that much
15 about 11(c)(1)(C). The Court obviously understands that as
16 well as anyone. We never had a discussion with the government
17 at all about a 15-year sentence, we never had a discussion
18 about an 11(c)(1)(C), we never negotiated a number of years
19 and certainly from our point of view, the purpose of
20 materially supporting the plea was that it gave the Court
21 latitude between zero and 15 years. That's what we negotiated
22 for and there was never any discussion to the contrary.
23 That's really all.

24 THE COURT: Mr. Stern?

25 MR. STERN: No, Your Honor.

1 THE COURT: Okay. Well, thank you again, all of
2 you, for your advocacy in writing and orally. It's very
3 useful to me. Before I impose sentence, I want to just say a
4 couple of words about the fact of this advocacy in this case.

5 You know, I was asked to testify earlier this week
6 in front of a committee that's studying the Criminal Justice
7 Act. Chief Justice Roberts created this ad hoc committee to
8 examine whether the way we delivered defense to the 80 percent
9 of the people in our courtrooms that are like Mr. Yusuf and
10 Mr. Ahmed, that is, they can't afford their own lawyer,
11 whether that ought to be restructured so we can do the best we
12 can to provide independent and high quality, properly
13 resourced defense counsel to them.

14 It is so important because our criminal justice
15 system distinguishes itself in so many ways. It's extremely
16 putative. It's far reaching. This case demonstrates that.
17 It's staffed on the prosecution side by some of the very best
18 lawyers in the country, some of whom are sitting right there
19 at that table. The integrity of our system requires constant
20 attention to the need to make sure that we provide exactly
21 that, independent counsel, high quality counsel, counsel who
22 are supportive, so that our three-legged system, we've got
23 judges, we've got prosecutors and we've got defense counsel
24 and, you know, if we fail in any one of those three, the
25 systems fails.

1 These men have every reason to wonder why they were
2 placed in custody in Africa and brought here. I don't wonder.
3 I think it was completely appropriate. I applaud the people
4 in the back who were part of this apparatus as Mr. Ariail
5 described it. I understand why someone on another continent
6 who joins this terrorist organization can properly be brought
7 to America, I have no problem with that, but I couldn't help
8 in preparing for today to think about, and now I can't help to
9 point it out the following point which I think is so important
10 and it relates to this obviously vigorous, well-funded,
11 independent high quality counsel that both of these men have
12 been provided.

13 The point is if the tables were turned and
14 al-Shabaab were to capture members of our military and pull
15 them out of Afghanistan or some other country and bring them
16 to Somalia, something tells me, without being an expert on the
17 subject, that you would be treated much differently. It means
18 a lot to our system of justice. I don't feel at all
19 self-conscious in pointing this out because in the dimensions
20 in which we fail, and we have injustices, I point that out, I
21 haven't been shy about that, credit where credit is due, the
22 system that delivers indigent defense for the most part works,
23 not just in cases like this.

24 I agree with Mr. Ariail the world watches cases like
25 this. It's very important for us to provide the kind of

1 defense these men got. And it happens not just in the cases
2 where the world watches, but in the 99 percent of the
3 remaining cases where really and truly no one cares except the
4 defendant himself or herself. So, good for counsel in the
5 case on all sides. It's so important that cases be litigated
6 like this.

7 I said at the outset, this is a very difficult case.
8 It's very difficult for me. It's interesting. I have already
9 suggested my take that this is not a black and white
10 situation. There are certain issues I am not troubled by at
11 all.

12 I am not troubled by Mr. Stern's argument about not
13 knowing about the law. That's fine with me, that the
14 defendants did not know about our material support law, but
15 the law does not generally require the defendant to be aware
16 of the law that his conduct violates. What it requires, as a
17 general matter -- there's only a few exceptions to this, none
18 of which comes anywhere close to a case like this -- all it
19 requires is that the defendant knowingly and intentionally do
20 what the law forbids. I have no doubt that these defendants
21 were aware that when they joined al-Shabaab, they knew that
22 that was culpable conduct. I'm not playing gotcha with anyone
23 here, that they're not aware of the material support statute
24 in my view passes in the night with general principles about
25 how and when we hold people accountable for their behavior.

1 I don't think either side is right in characterizing
2 the conduct. By that I mean, yes, I accept the defense
3 contention that in the main, the conflict that these men
4 sought to lend their support to was an internecine conflict.
5 Whether it involved Ethiopia or not, it was an internecine
6 conflict about the control of their homeland, what they
7 perceived to be their homeland, was their homeland, Somalia,
8 but the vehicle through which they engaged in that conduct was
9 al-Shabaab.

10 These are intelligent men. They understood what
11 that organization was and the breadth of its interests and the
12 fact that many of its interests are in such profound conflict
13 with the security of this country and other countries and they
14 need to be held accountable for that.

15 On the other hand, I don't accept all of the
16 inferences the government wants me to draw. Yes, the people
17 that they associated with and they conspired with certainly
18 had designs beyond the conflict in Somalia, they knew that
19 they were associated with people who had those designs and
20 they need to be held accountable for that, but when it comes
21 down to the granular detail of their involvement, there's not
22 that much support for the notion that they sought to involve
23 themselves in al-Shabaab's conduct outside of Somalia. Did
24 they sympathize with it? Yes, of course. Does that matter?
25 Of course.

1 I do not think principles of general deterrence, I
2 mean, they can never really be demonstrated to operate in any
3 context and I am not persuaded that they operate here. It's
4 hard to believe that the nuanced difference between a 15 year
5 sentence and a lower sentence, a few years lower than 15 years
6 is really going to matter to the folks who might become
7 jihadists.

8 This notion of specific deterrence or incapacitation
9 is a difficult one here. I'm sure a lot of people in this
10 courtroom will lie awake. Those who objected to the 15-year
11 cap that the government placed by virtue of its own barter
12 join me in lying awake at night wondering what's going to
13 happen when these men are released from custody in this case.
14 I don't have a crystal ball. Nobody else does either. One
15 would hope that their claims that have been made here in that
16 regard are made genuinely and they stick to them. That's a
17 very difficult dimension to this decision. It is difficult to
18 calibrate that into a sentence.

19 The need to punish this behavior, to impose a
20 sentence that demonstrates the seriousness of the criminal
21 conduct is a powerful factor here. This is a notorious
22 terrorist organization, the affiliation with which, the joiner
23 in which needs to be punished and will be punished.

24 The sentence I am imposing is ameliorated, is made
25 more lenient by the conditions of confinement in Djibouti, the

1 conditions of confinement prior to the imposition of this
2 sentence, and I have no doubt whether the restrictions are
3 lucent, but I have no doubt that the quality, the quality of
4 life that they have in serving the remainder of their sentence
5 is going to be substantially below that, that an ordinary
6 customer of the Bureau of Prisons would have. So I have
7 considered that.

8 The last thing I want to mention is this. I don't
9 begrudge you at all, Mr. Ariail, your assertion that's kind of
10 thinly veiled that plenty of judging was done, maybe even too
11 much judging by the government. What I mean by that is what
12 you are telling me is you have considered the circumstances
13 that warrant a sentence less than that mandatory 30 years and
14 in doing so, you have arrived at this 15 year max and what
15 you're telling me, and, again, I don't begrudge you for
16 telling me this, is that all the things that I should probably
17 take into account have already been factored into your
18 decision. I understand that.

19 MR. ARIAIL: That's correct, Your Honor.

20 THE COURT: I understand your belief that that's the
21 case, but it is my job to do the judging. There have been
22 occasions in which I myself have expressed a view that a
23 sentence that was negotiated in this way was insufficiently
24 punitive, but I have deferred to your judgment as I think I
25 should.

1 To my mind here, I am weighing as a judge, not as a
2 prosecutor, the same factors that in your Office's judgment,
3 if not your own, warranted a measure of leniency, an outside
4 limit provided I accepted the plea agreement, outside limit of
5 15 years in prison, but I weigh them slightly differently and
6 that is why I am not imposing a 15-year sentence.

7 I say that respectfully, but I think it is important
8 that we all understand whose responsibility it is in the end
9 of the day in a case like this where discretion hasn't been
10 taken from me entirely, whose responsibility it is to weigh
11 those factors and it is mine. All I can do is the best I can.

12 The sentence is 11 years in the custody of the
13 Attorney General and the sentence is imposed on each of the
14 defendants.

15 The recommendation here, Jamie, is there would be no
16 supervision, I guess, in contemplation of the deportation, the
17 return of the defendants back to I guess it will be Sweden?

18 THE PROBATION OFFICER: Yes, Your Honor.

19 THE COURT: Okay. There's a \$100 assessment but no
20 fine.

21 Does the government want to be heard with regard to
22 this recommendation that DOJ allow them to be sent to Sweden?

23 MR. ARIAIL: I don't think we'll take a position at
24 this point, Your Honor.

25 THE COURT: All right. That's granted.

1 And in a case like this, does the recommendation
2 into a place of incarceration make any sense?

3 MR. STERN: I'm not sure if we're able to do that
4 with the SAMs on them. I think it would be nice, if possible,
5 to have them together so there's someone who they can speak to
6 if they're allowed as Mr. Ariail suggested to be in an area
7 together.

8 THE COURT: I think that's a judgment best left to
9 the Bureau of Prisons.

10 MR. STERN: So I don't know how to make a
11 recommendation.

12 THE COURT: Anything further?

13 MS. KELLMAN: No, Your Honor.

14 THE COURT: Anything further?

15 MR. ARIAIL: No, Your Honor.

16 THE COURT: Thank you all. Have a good day.

17 (Matter concluded.)

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21 I certify that the foregoing is a correct transcript from the
22 record of proceedings in the above-entitled matter.

23 /s/ Charleane M. Heading

January 16, 2016

24 _____
CHARLEANE M. HEADING

DATE

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